BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALFRED T. JOHNSON Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket No. **1,060,601**
AND	)	
STATE SELF-INSURANCE FUND Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the June 27, 2012 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery. George H. Pearson, of Topeka, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated June 26, 2012, and all pleadings contained in the administrative file.

ISSUES

Claimant alleged he suffered a back injury when he attempted to prevent a patient, he was drying in a bathtub, from falling. Claimant had twisted to grab the patient who had started to fall and as both fell the claimant hit his chest on the bathtub. But claimant did not experience any pain or symptoms that day. K.S.A. 2011 Supp. 44-508(d), now requires the accident to produce symptoms at the time of an injury. Respondent denied the claim because claimant did not experience any symptoms at the time of the incident and consequently did not have an accident.

The Administrative Law Judge (ALJ) found claimant's symptoms were "contemporaneous" with the accident as they occurred within two days of the accident. The ALJ further determined the claimant's "accident was the prevailing factor causing the injury and medical condition and need for treatment."[1]

[1] ALJ's Order for Medical Treatment.

Respondent requests review of whether claimant sustained his burden of proof that he suffered an accidental injury arising out of and in the course of his employment with respondent. Respondent argues that K.S.A. 2011 Supp. 44-508(d) requires that an accident produce symptoms at the time of the injury and in this case claimant testified that his fall did not cause any symptoms at that time.

Claimant argues that the onset of pain within two days of the accident is contemporaneous or at the time of the accident and the ALJ's Order should be affirmed.

The sole issue raised on appeal from the preliminary hearing is whether claimant suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The facts are not disputed. Claimant began working for respondent in December 1982. His job as a medical health technician involves working with adult individuals that have an aggressive behavior and helping them with activities of daily living. On Wednesday, April 4, 2012, claimant attempted to grab a patient to prevent him from falling in the bathtub. Claimant described the accident:

> Oh, the accident was a young man was in the bathtub and he stood up to be dried off so that means I had to turn away from him. The towel was to my left so in my turning to pick up the towel he began to scream out and started falling so in my awkward bent position I was able to reach and grab him and prevent some of the fall but not all of the fall because he still got injured but I was able to break some of the fall and able to just continue to go down with him in the tub.[2]

Claimant hit his upper chest on the bathtub. But claimant testified that he did not have any pain or symptoms after the fall. Claimant worked the remainder of his shift and said he had no pain or symptoms the remainder of that day. The claimant worked his full shift the following day but that night at approximately 10:15 p.m., he mentioned to his wife that his back was tingling and felt "funny." On Friday morning, claimant was not able to get out of bed due to severe pain in his back and lower left side.

Claimant reported his accident to his supervisor. And the following Monday he completed an accident report. About a week after the accident, claimant was referred for medical treatment. Claimant was treated by Dr. Laurel Vogt at St. Francis Hospital.

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[2] P.H. Trans. at 13.

Claimant has continued to work for respondent. He has only missed approximately three days. Claimant was on light-duty restrictions until respondent denied his claim. Claimant received a letter dated April 12, 2012, indicating that his workers compensation claim had been denied. Consequently, claimant continues to work performing his regular job duties.

At the time of the preliminary hearing, claimant was having pain in his lower back on the left side and continuing down his left leg. Claimant testified that he is not able to stand or sit for an extended period of time.

At the request of claimant's attorney, Dr. Edward Prostic examined claimant on May 29, 2012, and opined that claimant sustained a low back injury during the course of his employment with radicular symptoms of the L5 and S1 nerve root on the left. Dr. Prostic recommended continued conservative treatment. Finally, Dr. Prostic opined that the work-related accident on April 4, 2012, was the prevailing factor in claimant's injury and need for treatment.

Respondent argues that the recent amendments to the workers compensation act have changed the definition of 'accident' to require that the accident produce symptoms of injury at the time of occurrence. And in this instance claimant admittedly did not have any pain or symptoms at the time he fell against the bathtub.

K.S.A. 2010 Supp. 44-508(d) defined "accident":

> Accident means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Effective May 15, 2011, the definition of accident was amended and K.S.A. 2011 Supp. 44-508(d) now defines accident in the following manner:

> 'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

The amended statute eliminated the sentence that contained the phrase that the elements of an accident are not to be construed in a strict and literal sense and replaced that sentence with the phrase that requires the accident to be identifiable by time and place of

occurrence, produce at the time symptoms of an injury, and occur during a singe work shift. Moreover, the accident must be the prevailing factor in causing the injury. In statutory construction a material change in a statute made by an amendatory act is presumed to change the original statute.[3] Moreover, in *Bergstrom*[4], the Supreme Court noted that when a workers compensation statute is plain and unambiguous, effect must be given to its express language. Under the new amended definition, in order to qualify as an accident under the act there must be symptoms of an injury at the time of the occurrence.

Applying the new definition of accident to the facts of this case results in a finding that because claimant did not have any symptoms of an injury at the time of the occurrence, the incident at work does not meet the new statutory definition of accident. The unfortunate consequence is that under the new definition of accident, claimant has failed to meet his burden of proof that he suffered a compensable "accident" at work. The ALJ's Order is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated June 27, 2012, is reversed.

IT IS SO ORDERED.

Dated this 14th day of September, 2012.

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HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

e: George H. Pearson, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

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[3] *Shapiro v. Kansas Public Emp. Retirement System*, 211 Kan. 452, Syl. ¶ 2, 507 P.2d 281 (1973).

[4] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[5] K.S.A. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).